IN THE HIGH COURT OF BOMBAY AT GOA

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APPEAL FROM ORDER NO. 63 OF 1999

Smt. Shilavatibai S.
Arporkar, major, r/o
Pomburpa, Bardez, Goa. ... Appellant.

Versus

1. Bhagvant P. Naik,

2. Smt. Bhavana B. Naik, both since deceased , by Shankarnath P. Naik, r/o House No.524, Mandur, Dongri, Ilhas, Goa. ... Respondent.

Mrs. A. A. Agni with Mrs. Asha Dessai, advocates for the appellant.

Mr. V. Menezes, advocate for the respondent.

CORAM: D. G. DESHPANDE, J.

DATE: 24th January, 2003.

ORAL JUDGMENT

Heard Mrs. Agni alongwith Mrs. Asha Dessai, learned counsel for the appellant and Mr. Menezes, learned counsel for the respondents.

2. This Appeal From Order is filed against the Order of the Civil Judge, Senior Division, Panaji, dated 30th October, 1999 in Inventory Proceedings No.67/96/A by which the respondent, Shankarnath P. Naik, was appointed as guardian of the minor.

3. The appellant contends that she is the maternal grand-mother of the minor and, as such, under Article 200 of the Portuguese Civil Code, she is entitled

to be preferred to the respondent. Earlier also, the appellant had filed an application on 21st December, 1996, as per the synopsis given, under Article 200 of the Portuguese Civil Code, praying that she be appointed as legal guardian of the minor child. The respondent also filed similar application under Article 2069 of the Portuguese Civil Code for removal of the appellant as 'cabeca de casal'. Similarly, the prayer of the appellant for appointment as guardian was also opposed by the respondent. The trial Court dismissed the application of the appellant against which a civil revision application was filed before this Court vide Civil Revision Application No.149/97 and this Court disposed of the Civil Revision Application by Order dated 2nd December, 1997, the matter was remanded to the lower Court and the impugned Order came to be passed.

4. This Appeal From Order was strongly opposed by the respondent on the ground that when the Civil Revision Application No.149/97 was filed by the appellant challenging the appointment of the respondent as guardian of the minor child, this Court, after hearing both the sides at length, passed an order on 22nd December, 1997, giving the following guidelines:-

> "6. So far as the dispute of guardianship is concerned, having ascertained the

facts about the tragic event of the death of the parents of the minor Sidhika and especially the fact that she has been mostly staying with her paternal family and has very little or no connection apparently with her maternal family, the provisions in the Civil Code of falling back upon the family council as envisaged in Article 207 is most eminently suited to the requirements of the case.

7. The trial Court shall see that the family council as per Article 207 read with Article 211 and 205 is convened at the earliest and the question of guardianship is got resolved through it. It is ofcourse understood that the decision of the family council shall be binding on all parties."

Learned counsel for the respondent therefore contended that the parties to the said civil revision application had agreed that the decision of the family council shall be binding on all the parties. Therefore, according to him, the impugned Order cannot be challenged, because it is

based on the decision of the family council.

5. On the other hand, Mrs. Agni, learned counsel for the appellant, contended that even if this Court by its Order dated 22nd December, 1997, has sent back the matter to the trial court and directions were given that the family council is constituted or convened under Article 207 read with other articles, it would not mean that the family council was to disregard the provisions or the limitations imposed upon it and it was open to the appellant to point out the illegalities committed by the family council. For example, under Article 218 of the Portuguese Civil Code no member of the family council was entitled to vote in the deliberations dealing with the matter in which he or she, or his or her ascendants, descendants or spouse are interested and the same is opposed to the interest of the minor. Mrs. Agni therefore contended that in the family council that was constituted by the trial Court, there was one member by name, Smt. Vishwati Shankarnath Naik, who was the wife of the present respondent and, therefore, by virtue of Article 218, she was not entitled to vote and, therefore, the decision taken by majority of three against two, i.e. three in favour of the respondent and two in favour of the appellant, could not be said to be a decision by majority, if the voting done by other second member Smt. Vishwati Shankarnath Naik is disregarded.

6. Mrs. Agni further contended that the family council should have first decided about confirmation of legal guardianship on the appellant because the appellant was, under Article 200, of the Portuguese Civil Code, capable of being appointed as a legal guardian, because Article 200 provides that legal guardianship vests on the relatives of the minor in the following order and she comes in the said category of "maternal grand-father or maternal grand-mother". According to Mrs. Agni, unless the family council decided that the appellant was not capable of being appointed as a guardian, or unless the family council gave any reasons why she could not be conferred the legal guardianship, the family council had no rights and powers to decide by vote as to who should be appointed as guardian and, consequently, the decision of the family council and that of the civil court is wrong and liable to be set aside.

7. As against this, the learned counsel for the respondent pointed out that when initially also the prayer of the appellant for appointment of guardian was rejected, she was required to file civil revision application before this Court, which was decided by this Court in the manner stated above. Therefore, the matter was sent back to the trial Court and the parties had agreed that the decision of the family council would be acceptable to them, or binding on them. Firstly, therefore, Mr. Menezes contended that

the appellant has not right to challenge the impugned Order.

8. Secondly, he contended that the objections which are now being taken, have no force because the Civil Judge, senior Division, Panaji, passed Order dated 23rd December, 1998, after considering all the aspects of the matter, constituting the family council and suggested five names. If, according to the appellant now, Smt. Vishwati Shankarnath Naik was incompetent to vote, the objection in that regard to her name should have been raised by the appellant, or if the appellant was aggrieved by the inclusion of her name in the family council, i.e. the name of Smt. Vishwati Shankarnath Naik, then she should have challenged the order of the Civil Judge, Senior Division, Panaji. That having not been done, now the appellant cannot make any grievance in that regard. He further contended that when the meeting of the family council took place (which is reflected in the minutes of the meeting of the family council at Exh.F), the appellant was present with her counsel, but at that time also when the so-called voting or ascertaining all the wishes of the members of the family council was done, no objection to the name of Smt. Vishwati Shankarnath Naik, or her participation, or voting was taken. Therefore, learned counsel for the respondent contended that on both the counts, namely when the Court passed the order constituting the family council and

secondly, when the family council held a meeting and decided the issue, no objection on any count whatsoever was taken by the appellant.

9. The submissions made by the learned counsel for the respondents are well-founded. No objection was taken by the appellant at the time when Smt. Vishwati Shankarnath Naik was selected as a member of the council, when she voted against the appellant, nor was anything shown as to how her presence was opposed to the interest of the minor. Similarly, no objections were raised before the Court. It is, therefore, clear that these are nothing but afterthoughts and hence, they are required to be rejected.

10. Apart from this, even if for the sake of argument it is accepted that Article 218 of the Portuguese Civil Code applies in the facts of the case, there is no total bar in voting, but what is laid down is that no member shall vote if her spouse is interested and the same is opposed to the interest of the minor. Therefore, while voting two aspects are required to be considered, namely whether the spouse of the member is interested, and secondly, whether it is opposed to the interest of the minor. Nothing was placed before the trial Court at the time of passing of the impugned Order, or at the time or the order for constitution of the family council, or in the meeting held by the family council that Smt. Vishwati

Shankarnath Naik's participation was opposed to the interest of the minor.

11. For all these reasons and mostly because of the binding nature of the order passed by this Court in the earlier civil revision application, there is no merit in this Appeal From Order and it is dismissed.

D. G. DESHPANDE, J.

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